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August 5, 1999

EX PARTE

Magalie R. Salas, Secretary  
Federal Communications Commission  
The Portals Building  
445 12th Street, SW  
TW-A325  
Washington, D.C. 20554

RECEIVED

AUG 5 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: CC Docket No. 94-54

Dear Ms. Salas:

On August 4, 1999, Raidza Wick of America One Communications, Inc., along with Henry Goldberg, met with Ari Fitzgerald, Legal Advisor to Chairman Kennard, regarding the above-referenced proceeding. The attached documents summarize the resale issues discussed.

Sincerely,



Henry Goldberg  
Attorney for  
America One Communications, Inc.

Attachment

cc: Ari Fitzgerald

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The Commission Has Already Adopted  
Criteria for Evaluating Forbearance  
from the Resale Requirement

- Facilities-based carriers ask the Commission to “adopt an objective and readily discernible test”
- The Commission provided the appropriate evaluation criteria in its denial of PCIA’s petition for forbearance and should retain them
- Adoption of less comprehensive criteria may result in an erroneous grant of forbearance to the detriment of consumers and market competition

Use of *Prima Facie* Test for  
Rebuttable Presumption of  
Competitiveness in a Market

- If the Commission wishes to simplify the process for review of forbearance-from-resale requests, the Commission may consider a test for establishing a *prima facie* case that an MSA/RSA is competitive
- If the *prima facie* test is met in an MSA/RSA, then there is a rebuttable presumption in favor of forbearance in this MSA/RSA, and the burden of proof shifts to those opposing forbearance

The Number of Carriers Alone  
Does Not Determine a  
Market's Competitiveness

- Quantitative tests that rely solely on a minimum number of carriers per market do not measure market competition
- Oligopolistic behavior can exist in a market with four facilities-based carriers
- Under Department of Justice merger guidelines, a market with only four competitors is regarded as highly concentrated and raises concerns about market competitiveness

Traditional Elements Used to  
Examine Competitiveness of a  
Market

- Concentration (market share)
- Elasticity of supply of fringe firms (barriers to entry)
- Elasticity of demand

Definition of a Market for  
Design and Application of  
*Prima Facie* Test

- The *prima facie* test should consist of elements that serve as proxies for the criteria generally used in examining market competitiveness
- The test should be applied on the basis of MSAs/RSAs
  - The industry has previously provided subscriber/market information on the basis of MSAs (see PCIA reply comments in spectrum cap)
  - Concern about entrenched carriers licensed in MSAs

## *Prima Facie* Test

**For purposes of a forbearance petition only, if the following criteria are met there is a rebuttable presumption that a market (MSA/RSA) is competitive:**

- Herfindahl-Hirschman Index (HHI) below 2000, with no player exceeding a 35% share
- At least 6 viable carriers - To be viable, a carrier must meet each of the following criteria:
  - First retail customer added at least 6 months ago
  - Market share at least 5% (of subscribers)

## Herfindahl-Hirschman Index/ Market Share Prong

**Proposed Criteria: HHI less than 2000 and maximum individual share less than 35%** (HHI below 2000 and 35% share maximum ensures that the market is not dominated by one or two players)

- DOJ guidelines<sup>1</sup>:
  - Below 1000 = “unconcentrated”
  - Over 1800 = “highly concentrated”
- Theoretical minimum in wireless markets
  - 1343 if proportional to  $MH_z^2$  (9 carriers including one SMR)
  - 1111 if 9 evenly matched players
- 35% share recognized to create undue market power
- HHI is calculated by summing the squares of each facilities-based carrier’s subscriber market shares

<sup>1</sup> Horizontal Merger Guidelines, Section 1.51, US Department of Justice and Federal Trade Commission, 1992

<sup>2</sup> PCIA comments to WT Dockets 98-205, 96-59 and GN Docket 93-252



## Presence of Viable Carriers

### **Proposed Criteria: At least 6 viable facilities-based carriers**

- Carrier viability determined by meeting each of the following criteria:
  - First retail customer added at least 6 months ago
  - Market share at least 5% (of subscribers)
- Six viable carriers ensures oligopolistic behavior difficult to sustain<sup>1</sup>

<sup>1</sup> "A Simple Model of Imperfect Competition", Selten 1973

## **ECONOMICS OF RESALE**

- Role of Resale in the Market (economic rationale for resale)
- Cost-Benefit Analysis of Wireless Resale
- Opposition to Resale
- Mandatory Resale Requirement

## **ROLE OF RESALE IN THE MARKET**

- Improves realization of divergent economies of scale - lower prices
- Disciplines price discrimination by upstream firms
  - a price discriminating firm will charge relatively high prices to customers with low elasticity of demand, and relatively low prices for customers with high elasticities
  - opportunity for a reseller to purchase the product at the lower price and sell it to the customers for a price lower than that normally charged by the price-discriminating firm to certain market segments
- Facilitates entry by limiting sunk costs

## **BENEFITS OF RESALE**

- Promotes entry into market - more competition
- Lowers costs
- Limits price discrimination - lower prices for consumers
  - important in a market where customers with modest usage pay rates three to four times higher than high-volume users
- Product innovation
- Resale is not an ephemeral phenomenon
  - long distance resale

## **COSTS OF WIRELESS RESALE?**

- FCC prohibits only a restriction on resale
- FCC does not require special contract terms, a mandated wholesale discount or creation of additional capacity
- Administrative costs - No evidence of significant costs of compliance
- Concern about exposure due to non-payment
  - Address through contract clauses such as lines of credit, deposits

## **WHY SOME CARRIERS MAY OPPOSE RESALE?**

- Resale facilitates entry of providers into the market
- Resellers regarded as “competitors”
- Different market segments charged disparate prices
- Resellers bridge the gap in this price differential - cuts into the facilities-based carriers’ profits from disparate pricing
- Carriers want “agents” (not resellers) because resellers set their own prices

## **RESALE REQUIREMENT**

- Most carriers oppose resale
- Resellers deemed a competitive threat - discipline market/  
limit opportunity for unwarranted price discrimination
- Resale is most strenuously opposed where it is most needed
- But for the mandatory resale requirement, most carriers would not allow resale